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Supreme Court, U.S.
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No. 96-1021

In The

Supreme Court of the United States

October Term, 1996

ILLINOIS HIGH SCHOOL ASSOCIATION,

Petitioner,

vs.

GTE VANTAGE INCORPORATED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts below correctly denied IHSA's request to enjoin use of the mark MARCH MADNESS on goods related to the NCAA college basketball tournament, because there had been fifteen years unchallenged public identification of the mark with the NCAA tournament, IHSA had only used the mark regionally in connection with its high school basketball tournament, and the NCAA had prior use of the mark in connection with its tournament and related goods.

2. Whether media use of a trademark is evidence of its meaning to the public and its association and public identification with a particular source.

3. Whether the Seventh Circuit Court of Appeals "created a new dual-use trademark" which "undermines the long accepted function and understanding of trademarks."

4. Whether the Seventh Circuit Court of Appeals held that media use of MARCH MADNESS "divested" the IHSA of its rights in the mark, "transferred" those rights to another, or "upset the balance between trademark protection and the First Amendment."

5. Whether this case of first impression is appropriate for review by this Court.

RULE 29.6 STATEMENT

The parent company of GTE Vantage Incorporated is GTE Corporation. GTE Vantage Incorporated has no subsidiaries. GTE Vantage Incorporated is a licensee of the National Collegiate Athletic Association with regard to the trademark at issue in this case.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory and Constitutional Provisions Involved	1
Abbreviations in this Brief	1
Statement of the Case	2
Statement of Facts	3
Reasons for Denying the Writ	6

I. Whether The Courts Below Correctly Denied IHSA's Request To Enjoin Use Of The Mark MARCH MADNESS On Goods Related To The NCAA College Basketball Tournament, Because There Had Been Fifteen Years Unchallenged Public Identification Of The Mark With The NCAA Tournament, The IHSA Had Only Used The Mark Regionally In Connection With Its High School Basketball Tournament, And The NCAA

Contents

Page

Had Prior Use Of The Mark In Connection With Its Own Tournament And Related Goods. 6

II. Whether Media Use Of A Trademark Is Evidence Of Its Meaning To The Public And Its Association And Public Identification With A Particular Source. 11

III. Whether the Seventh Circuit Court Of Appeals "Created A New Dual-Use Trademark" Which "Undermines The Long Accepted Function And Understanding Of Trademarks." 15

IV. Whether The Seventh Circuit Court Of Appeals Held That Media Use Of MARCH MADNESS "Divested" IHSA Of Its Rights In The Mark, "Transferred" Those Rights To Another, Or "Upset The Balance Between Trademark Protection And The First Amendment." 17

V. Whether This Case Of First Impression Is Appropriate For Review By This Court. 19

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

American Steel Foundaries v. Robertson, 269 U.S. 372 (1926) 7, 8

Contents

	Page
American Stock Exchange, Inc. v. American Express Co., 207 U.S.P.Q. 356 (TTAB 1980)	9
Boston Athletic Association v. Sullivan, 867 F.2d 22 (1 Cir. 1989)	10
Brockum v. Blaylock, 729 F. Supp. 438 (E.D. Pa. 1990)	10
Castle Oil Corp. v. Castle Energy Corp., 26 U.S.P.Q. 2d 1481 (E.D. Pa. 1992)	8
Coca-Cola Company v. Busch, 44 F. Supp. 405 (E.D. Pa. 1942)	9
Cuban Cigar Brands N.V. v. Upmann Int'l, Inc., 457 F. Supp. 1090 (S.D.N.Y. 1979), *aff'd without opinion*, 607 F.2d 995 (2 Cir. 1979)	7, 10
El Greco Leather Products Co. v. La Muir, Inc., 806 F.2d 392 (2 Cir. 1986)	6
General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938)	20
In Re Leatherman Tool Group, Inc., 32 U.S.P.Q. 2d 1443 (TTAB 1994)	12
In Re Medical Disposables Co., 25 U.S.P.Q. 2d 1801 (TTAB 1993)	12

Contents

Page

In Re Northland Aluminum Products, Inc., 777 F.2d 1556 (Fed. Cir. 1985) 12

Keebler Co. v. Roving Biscuit Corp., 624 F.2d 366 (1 Cir. 1980) 11

Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5 Cir. 1987) 6

Loctite Corp. v. National Starch and Chemical Corp., 516 F. Supp. 190, 211 U.S.P.Q. 237 (S.D.N.Y. 1981) 12

Motor Master Products Corp. v. Motor Masters Warehouse, Inc., 463 F. Supp. 232 (E.D. Pa. 1978) 8

Murphy Door Bed Co., Inc. v. Interior Sleeping Systems, Inc., 874 F.2d 95 (2 Cir. 1989) 13, 14

National Cable Television Association, Inc. v. American Cinema Editors, Inc., 937 F.2d 1572 (Fed. Cir. 1991) 9

Pieper v. Playboy Enterprises, Inc., 179 U.S.P.Q. 318 (TTAB 1973) 9

Polymer Technology Corp. v. Mimram, 975 F.2d 58, *after remand*, 37 F.3d 74 (2 Cir. 1994) 6

Contents

	Page
Qualitex Co. v. Jacobson Products Co., __ U.S. __, 115 S. Ct. 1300 (1995)	6
Saxlehner v. Eisner & Mendelson Co., 179 U.S. 19 (1900)	13
Selchow & Rigter Co. v. McGraw-Hall Book Company, 580 F.2d 25 (2 Cir. 1978)	13, 14
Shell Oil Co. v. Commercial Petroleum, Inc., 928 F.2d 104 (4 Cir. 1981)	6
Sunmark, Inc. v. Ocean Spray Cranberries, Inc., 64 F.3d 1055 (7 Cir. 1955)	12
The American Thermos Products Company v. Aladdin Industries, Inc., 207 F. Supp. 9 (D. Col. 1962), *aff'd sub. nom., King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 321 F.2d 577 (2 Cir. 1963)	13, 14
United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90 (1918)	7, 8
United States v. Steffens, 100 U.S. 82 (1879)	7
University of Notre Dame DuLac v. J.C. Gourmet Foods Import, Co., 703 F.2d 1372 (Fed. Cir. 1983)	7, 10
Volkswagonwerk v. Wheeler, 814 F.2d 812 (1 Cir. 1987)	7

Contents

Page

Zazu Designs v. L'Oreal S.A., 979 F.2d 499 (7 Cir. 1992) 7

Statutes Cited:

15 U.S.C. § 1064(3) 7, 10

15 U.S.C. § 1125(a) 7, 10

15 U.S.C. § 1127 ..... 6, 18

United States Constitution Cited:

First Amendment 1, 11, 17, 18, 19, 20

Rule Cited:

Supreme Court Rule 10 19

Other Authorities Cited:

Gilson, *Trademark Protection & Practice*, Vol. 1, § 2.02[7] 13, 14

Gilson, *Trademark Protection & Practice*, Vol. 1, § 3.03[2][d] 7

McCarthy, *Trademarks and Unfair Competition*, Vol. 2, § 16.03 7

Contents

Page

APPENDIX

Appendix A — Example of Media Use Taken From D. Ex 18 ..... 1a

Appendix B — Excerpts of Transcript of Proceedings Dated March 20, 1996 ..... 8a

OPINIONS BELOW

Respondent GTE Vantage Incorporated ("GTE") concurs in Petitioner's statement of the Opinions Below.

STATEMENT OF JURISDICTION

GTE concurs in Petitioner's Statement of Jurisdiction.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

GTE concurs in Petitioner's statement of the statutory provisions involved; however, Respondent does not agree that the First Amendment of the Constitution of the United States, U.S. Const. Amend I, is involved in this case.

ABBREVIATIONS IN THIS BRIEF

"GTE" means GTE Vantage Incorporated.

"NCAA" means National Collegiate Athletic Association.

"IHSA" means Illinois High School Association.

"Petitioner's Appendix, p.__" refers to a page or pages in the Appendix which is part of the Petition for a Writ of Certiorari.

"Respondent's Appendix, p.__" refers to a page or pages in the Appendix which is a part of this Brief in Opposition.

"Tr. __" refers to a page or pages in the transcript of the proceedings in the District Court.

"P. Ex __" and "D. Ex __" refer, respectively, to the

numbers of plaintiff's and defendant's exhibits admitted in evidence in the District Court.

STATEMENT OF THE CASE

On March 6, 1996, IHSA sued GTE for infringement of the mark MARCH MADNESS, based upon GTE's use of that mark in a web page promotion of a computer game entitled "NCAA Championship Basketball," which GTE markets under a license from the NCAA. IHSA asked for a preliminary injunction.

At the injunction hearing, the parties agreed to certain evidence, and IHSA presented a witness concerning the nature and scope of IHSA's use of the mark. The District Court refused to enjoin GTE, finding, *inter alia,* that IHSA's past use and rights in the mark were limited to its high school basketball tournament and the Illinois region; that attempts to expand that use beyond the IHSA tournament came after the public had associated the term with the NCAA college championship basketball tournament; that GTE's use of the mark was via license from the NCAA and clearly in connection with the NCAA tournament; and that there was no likelihood of confusion. (Petitioner's Appendix, pp. 11a-12a, 13a, 14a-17a). IHSA's motion for expedited reconsideration was denied, and it appealed to the United States Court of Appeals for the Seventh Circuit.

On October 30, 1996, the Court of Appeals held that the preliminary injunction sought by IHSA was rightly denied by the district court, and that the IHSA's trademark rights did not extend to the NCAA tournament and to merchandise such as GTE's game that is sold in connection with that tournament. The court expressly refrained from opining on the scope of the trademark rights of either IHSA or NCAA. (Petitioner's Appendix, p. 7a).

STATEMENT OF FACTS

Until very recently, IHSA's use of MARCH MADNESS was limited to the Illinois High School Basketball Tournament and was, at most, regional in scope.

Before 1980, IHSA used the mark on Illinois high school basketball tournament programs, in a book, in bulletins, and on souvenir cups, all of which were distributed at the Illinois tournament site or from the IHSA office, principally to Illinois residents. (Respondent's Appendix, pp. 6a-10a; Petitioner's Appendix, p. 11a: and Tr. 19, 20). IHSA says it gave verbal approval to some other state high school associations to use MARCH MADNESS in the early 1970's (Petitioner's Appendix 13a and Tr. 21, 43), but there was no evidence of actual use by any such associations.

At least as early as 1981, the national media began using MARCH MADNESS in connection with the NCAA tournament. (D. Ex. 18, Doc. N57; Boston Globe, March 9, 1981; *see also* sample media references at Respondent's Appendix, pp. 2a-6a; and Petitioner's Appendix, pp. 2a, 11a, and 12a). The mark was picked up universally by sportscasters and used over the years in connection with the NCAA tournament. (Petitioner's Appendix 11a-13a) The media and public have used the mark in connection with the NCAA tournament ever since (D. Ex. 18), and the courts below found that the public had come to associate MARCH MADNESS with the NCAA tournament. (Petitioner's Appendix, pp. 2a, 5a, 6a-7a, 11a-13a).

IHSA used MARCH MADNESS on apparel in the 1980s; on souvenir shirts in 1983; on a video tape about the IHSA tournament in 1988; and on souvenir pins, sweatshirts, and caps in 1991. All of these goods specifically related to and

referenced the Illinois high school basketball tournament, and all were sold either at the tournament site or at the IHSA office, principally to Illinois residents. (Respondent's Appendix, pp. 7a-10a; Petitioner's Appendix, p. 15a). The mark was also placed on clothing by merchants in the Champaign, Illinois area without any formal license, and without advance permission of IHSA. (Respondent's Appendix, pp. 14a-15a). IHSA said that, at times, radio and television stations carried parts of the tournament, but there was no evidence of what stations or of actual use of the mark in any broadcasts. (Respondent's Appendix, p. 12a; Petitioner's Appendix, p. 15a; and Tr. 26).

On February 22, 1993, the NCAA applied to the U.S. Patent and Trademark Office to register MARCH MADNESS for use in connection with its tournament (D. Ex. 40 and 26), and, in May, 1994, IHSA applied to register MARCH MADNESS for its tournament; both applications have been suspended due to proceedings before the Trademark Trial and Appeal Board. IHSA has never owned a federal registration for MARCH MADNESS in connection with sanctioning, supervising and regulating high school basketball tournaments (or any tournaments), or for any related promotional goods. (Respondent's Appendix, p. 12a).

In 1993, the NCAA began to license use of MARCH MADNESS in order to control the goodwill surrounding its event. (Petitioner's Appendix, p. 2a and Tr. 8, 56; D. Ex. 24, Doc. N 0549; D. Ex. 25, Doc. N 0253).

Many third parties have also used the mark in connection with a variety of goods and services (D. Ex. 19; see also P. Ex. 32), such as restaurant services, golf course services, and retail furniture services.

The first time IHSA licensed or attempted to use MARCH

MADNESS in a context other than the Illinois high school basketball tournament was a license to PepsiCo in December 1994. (Respondent's Appendix 11a, 12a-13a). In mid to late 1995, IHSA licensed eleven other state high school associations to use MARCH MADNESS to promote their respective tournaments at their tournament sites, but not on products. The license fee was $10.00 for three years. (Respondent's Appendix, p. 10a and Tr. 33-4, 48). There was no evidence these state associations actually used the mark. The IHSA web site went on-line on January 15, 1996 (Respondent's Appendix, p. 11a) and uses the mark exclusively in relation to the Illinois high school basketball tournament. (Respondent's Appendix, p. 14a). In early 1996, IHSA also licensed Wilson Sporting Goods to use the mark on basketballs and apparel. (Respondent's Appendix 11a and Tr. 24-5; P. Ex. 16).

In 1996, after receiving a license from the NCAA, GTE began promoting its CD-ROM game entitled "NCAA Championship Basketball." (D. Ex. 1) GTE uses MARCH MADNESS, along with "NCAA," on its web page (D. Ex. 17), its magazine advertisements (D. Ex. 7), the back side of its game packaging (D. Ex. 11), and one of the computer screens in the game (D. Ex. 6). The game is specifically tied to the NCAA tournament and 64 major college participants (also licensed).

On February 29, 1996, IHSA told GTE to either stop using the mark (P. Ex. 22, Doc. I 1549) or take out a license with IHSA. (D. Ex. 16) GTE refused, and, on March 6, 1996, IHSA filed the this case and moved for a preliminary injunction.

REASONS FOR DENYING THE WRIT

I.

WHETHER THE COURTS BELOW CORRECTLY DENIED IHSA'S REQUEST TO ENJOIN USE OF THE MARK MARCH MADNESS ON GOODS RELATED TO THE NCAA COLLEGE BASKETBALL TOURNAMENT, BECAUSE THERE HAD BEEN FIFTEEN YEARS UNCHALLENGED PUBLIC IDENTIFICATION OF THE MARK WITH THE NCAA TOURNAMENT, THE IHSA HAD ONLY USED THE MARK REGIONALLY IN CONNECTION WITH ITS HIGH SCHOOL BASKETBALL TOURNAMENT, AND THE NCAA HAD PRIOR USE OF THE MARK IN CONNECTION WITH ITS OWN TOURNAMENT AND RELATED GOODS.

The Seventh Circuit's decision was based on the facts adduced at the hearing, and was well grounded in the following trademark law and principles.

A mark is a symbol of source for a product or service, 15 U.S.C. § 1127; it represents to the public a certain content or quality in an event or product. *E.g., Qualitex Co. v. Jacobson Products Co.*, __ U.S. __, 115 S. Ct. 1300 (1995); *El Greco Leather Products Co. v. La Muir, Inc.*, 806 F.2d 392, 395 (2 Cir. 1986); *Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 108 (4 Cir. 1981); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5 Cir. 1987); *Polymer Technology Corp. v. Mimram*, 975 F.2d 58, *after remand*, 37 F.3d 74 (2 Cir. 1994).

A trademark does not represent rights in gross — it is only the specific application to goods or services in connection with

which the mark is used (or reasonable expansion) that is protected, *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 96 (1918); *American Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926); *University of Notre Dame DuLac v. J.C. Gourmet Foods Import, Co.*, 703 F.2d 1372 (Fed. Cir. 1983), nor can a mark be used to misrepresent one's goods as coming from another source. 15 U.S.C. §§ 1064(3) and 1125(a) *See Cuban Cigar Brands N.V. v. Upmann Int'l, Inc.*, 457 F. Supp. 1090 (S.D.N.Y. 1979), *aff'd without opinion*, 607 F.2d 995 (2 Cir. 1979).

Trademark rights grow out of use and association, not from creating, inventing, originating or acquiring "title" to the mark. *United States v. Steffens*, 100 U.S. 82, 94 (1879); McCarthy, *Trademarks and Unfair Competition*, Vol. 2, § 16.03, p. 16-16. The rights belong to the one who first uses the mark ***in connection with a particular line of business***. *Volkswagonwerk v. Wheeler*, 814 F.2d 812 (1 Cir. 1987). As stated in Gilson, *Trademark Protection & Practice*, Vol. 1, § 3.03 [2][d]:

> To establish actual, as opposed to constructive use priority rights it is necessary to make actual use of the mark on the goods or in association with the services.

Moreover, as to marks which have acquired secondary meaning, McCarthy, *Trademarks and Unfair Competition*, Vol. 2, § 16.12, p. 16-42, states:

> The territorial extent of secondary meaning may be limited, and if this is so, it will limit the rights of the user.

The Seventh Circuit recognized these principles in *Zazu Designs v. L'Oreal S.A.*, 979 F.2d 499 (7 Cir. 1992) (common law

trademark rights depend on the geographic scope of use and the differences in the services involved). This Court articulated similar principles in *United Drug Co. v. Theodore Rectanus Co., supra*, 248 U.S. 90 (1918) (geographic limitation) and *American Steel Foundries v. Robertson, supra*, 269 U.S. 372 (1926) (limitation as to type of goods or services).

Even the presumptive validity of a trademark registration applies only to the goods or services listed in the registration, 15 U.S.C. § 1115(b). *See also Motor Master Products Corp. v. Motor Masters Warehouse, Inc.*, 463 F. Supp. 232 (E.D. Pa. 1978); *Castle Oil Corp. v. Castle Energy Corp.*, 26 U.S.P.Q. 2d 1481 (E.D. Pa. 1992).

The decisions of the courts below embody the above principles: IHSA cannot have unlimited "rights in gross" in MARCH MADNESS. IHSA's rights in the mark are only those coterminous with its actual use of the mark. IHSA's actual use of the mark, as found by the District Court (and not challenged here or in the Seventh Circuit), is limited in both scope and geographic area.

Here, over a fifteen year period (1981 to date), MARCH MADNESS became associated with the NCAA tournament (*see* sample media references at Respondent's Appendix, pp. 2a-6a; *see also* Petitioner's Appendix, pp. 2a, 5a, 11a-13a), while IHSA continued to use the mark in connection with its tournament in the Illinois region. IHSA's attempts to expand its use of the mark started in December 1994, after the NCAA had begun licensing the mark in 1993, and long after the public use of the mark to denote the NCAA tournament. Thus, although the IHSA is a senior user of the mark in connection with its high school basketball tournament, it is the junior user of the mark in connection with the NCAA tournament.

The media and resulting public use of the mark created an association and secondary meaning in the mark when used in connection with the NCAA tournament. Legal precedent shows that such use gave the NCAA rights in MARCH MADNESS.

For example, *Coca-Cola Company v. Busch*, 44 F. Supp. 405 (E.D. Pa. 1942), held that the public's use of "Coke" created rights in Coca-Cola — even though it never used the mark itself — which were senior to defendant's use of "Koke." And, *American Stock Exchange, Inc. v. American Express Co.*, 207 U.S.P.Q. 356 (TTAB 1980), held that public references to American Express as AMEX made American Express senior to the American Stock Exchange in such use:

> Further, it has been held that where the public has come to associate a term with a particular company and/or its goods and services as a result, for example, of use of the term in the trade and by the news media, that company has a protectable property right in the term, even if the company itself has made no use of the term.

Id. at 364. *See also National Cable Television Association, Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572 (Fed. Cir. 1991) (widespread use by third parties is sufficient association of mark with defendant); and *Pieper v. Playboy Enterprises, Inc.*, 179 U.S.P.Q. 318 (TTAB 1973) (newspaper use of "BUNNY CLUB" as synonym for Playboy Club from 1962 to 1965 created rights in Playboy superior to Pieper's 1964 use for same services).

The results of fifteen years of media and public use of the mark in connection with the NCAA tournament were twofold: the right of the IHSA to expand its limited use and control of

the mark was diminished; and the NCAA acquired a right in the mark via its cumulative, strong association with the NCAA tournament. Moreover, IHSA's limited rights in the mark have been weakened over the years due to its allowing businesses to use the mark in connection with the high school basketball tournament without IHSA control (Respondent's Appendix, pp. 14a-15a; Petitioner's Appendix, pp. 3a-4a, 5a and Tr. 47-8) and unrestricted use of the mark by others. (Petitioner's Appendix, pp. 5a; *see also* D. Ex. 19, examples of such uses).

Further, in the case of "event" related products, as here, the case law indicates that it is the event sponsor that has the right to control merchandise related to the event. *Boston Athletic Association v. Sullivan*, 867 F.2d 22 (1 Cir. 1989) (sponsor of the Boston Marathon had a right to control promotional merchandise, even though the infringer was the first party to make such promotional merchandise, and even though the merchandise at issue did not utilize any of the sponsor's trademarks); *Brockum v. Blaylock*, 729 F. Supp. 438 (E.D. Pa. 1990) (event sponsor is the party entitled to benefit from the goodwill of the event; defendant could not obtain a 'free ride' at the plaintiff's expense).

The IHSA does not and cannot have any control over the conduct, content, or quality of the NCAA tournament and, thus, cannot use or control the use of the mark in connection with that tournament. The use of a mark in connection with the goods or services of another is a misrepresentation of source and, if there is a registration, subjects it to cancellation on that ground alone. 15 U.S.C. §§ 1064(3) and 1125(a). *See University of Notre Dame DuLac v. J.C. Gourmet Foods Import Co., supra*, and *Cuban Cigar Brands N.V. v. Upmann Int'l, Inc., supra*. The NCAA is entitled to capitalize on the media's use of the mark in connection with its tournament (here, by license to GTE), because it conducts, operates, and controls that event.

Moreover, IHSA admitted below that it does not think there will be any confusion of products (Respondent's Appendix, pp. 13a-14a, 15a), which is sufficient basis to affirm the denial of the injunction. Indeed, IHSA's belief that there will be no confusion is quite well grounded, because, for over fifteen years, the mark has been used concurrently in connection with both the NCAA and IHSA tournaments without the slightest confusion on anyone's part. *Keebler Co. v. Roving Biscuit Corp.*, 624 F.2d 366 (1 Cir. 1980) (many years of coexistence without actual confusion is strong evidence that there is no likelihood of confusion).

The denial of IHSA's requested injunction was well grounded in existing law; was correctly decided based on the facts of this case; and is not contradicted by or contrary to any decision of this or any other court. The petition should be denied.

II.

WHETHER MEDIA USE OF A TRADEMARK IS EVIDENCE OF ITS MEANING TO THE PUBLIC AND ITS ASSOCIATION AND PUBLIC IDENTIFICATION WITH A PARTICULAR SOURCE.

IHSA does not dispute the public identification of the mark with the NCAA; indeed, IHSA's thesis is that the courts below should have ***ignored*** the identification of the mark with the NCAA tournament, because it was spawned by the media, which IHSA says it was powerless to stop due to the First Amendment. IHSA advances its thesis because it believes that, if media references are ignored, it will then have fee simple title to a mark of undiminished strength, and the right to control all commercial uses of the mark.

As shown above, IHSA's argument is legally wrong. It never had the unlimited right it claims; its expansion rights were limited; and, meanwhile, the NCAA acquired rights in the mark. The viability of IHSA's mark is critically linked to its ability to indicate a source. If a mark has come to identify another source or sources, that fact cannot be ignored because of the means by which the source shift was effected.

The cases cited by IHSA (Petition, p. 12) are beside the point. None involve the media using one party's mark in association with another party's goods or services. Moreover, this case is not against the media, and **how** the media used the mark is irrelevant.

Here, the media exhibits are **evidence** which shows: (1) the mark **was** used in connection with the NCAA tournament **for a very long time**, and long before IHSA attempted to assert control over NCAA use of the mark; and (2) the public came to understand that MARCH MADNESS **meant** the NCAA tournament. It is the end result — the public **association** of the mark with the NCAA tournament — which is pertinent, and that fact is not in dispute.

Evidence of the public's understanding of a term may be obtained from any competent source, including newspapers and other publications. *E.g., In Re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 1559 (Fed. Cir. 1985); *In Re Leatherman Tool Group, Inc.*, 32 U.S.P.Q. 2d 1443, 1449 (TTAB 1994); *In Re Medical Disposables Co.*, 25 U.S.P.Q. 2d 1801, 1804 (TTAB 1993). *And see, Sunmark, Inc. v. Ocean Spray Cranberries, Inc.*, 64 F.3d 1055, 1059 (7 Cir. 1955) (newspaper articles referenced to show that "sweet-tart" was descriptive); *Loctite Corp. v. National Starch and Chemical Corp.*, 516 F. Supp. 190, 211 U.S.P.Q. 237, 245 (S.D.N.Y. 1981) (based on media usage, "superglue" was generic).

And, in *The American Thermos Products Company v. Aladdin Industries, Inc.*, 207 F. Supp. 9, 14 (D. Col. 1962), *aff'd sub. nom., King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 321 F.2d 577 (2 Cir. 1963), even though the plaintiff acted against other commercial uses, its failure to act with respect to "the unorganized public exclusive of those in the trade" caused the mark THERMOS to become generic. In *Selchow & Rigter Co. v. McGraw-Hall Book Company*, 580 F.2d 25 (2 Cir. 1978), the possibility that defendant's use would render a mark generic was ground for an injunction. *Murphy Door Bed Co., Inc. v. Interior Sleep Systems, Inc.*, 874 F.2d 95, 101 (2 Cir. 1989), held that regardless of efforts to police, once a mark enters the public domain beyond recall, policing is of no consequence.

IHSA's position that it could not (or should not be required to) challenge media use is simply wrong. As stated in Gilson, *Trademark Protection & Practice*, Vol. 1, § 2.02[7], pp. 2-51:

> In addition to avoiding any generic use of the mark himself, a trademark owner must seek out and challenge misuse of the mark by the public, the industry, the Patent & Trademark Office, trade and consumer publications, and others. It may not be sufficient to limit his challenges to those which come to his attention.

IHSA complains that "the Seventh Circuit's decision would compel mark owners to do everything in their power to halt all non-commercial uses of their marks." But, this is nothing new. *See Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 33 (1900). Assuming, *arguendo*, a mark-owner has no cause of action against one in the media who uses the mark to indicate source indicativeness of another's product (no case cited by the Petitioner so holds), the owner still must act or risk the consequences of association of that mark with another.

There are numerous examples of trademark owners challenging journalists, albeit not in suit. The owners of the JOCKEY and ANT FARM marks were subjected to ridicule by humorists, but the point was made, and the marks were protected. (Exhibit B to GTE's Brief in Opposition To Motion for Reconsideration). Xerox chose to wage its battle against improper use in the media and reference texts by launching an informational advertising campaign, all aimed at the public perception which IHSA believes should be ignored. Gilson, *Trademark Protection & Practice*, Vol. I, § 2.02[7], pp. 2-51, ft. 98, quotes one of the series of Xerox advertisements used to combat public and media mis-use. *See also American Thermos, supra,* and *Selchow & Righter Co., supra.*

For decades, IHSA neither protested nor otherwise tried to protect its regional mark. Instead, it allowed the public consciousness to connect the term with the NCAA tournament. The IHSA cannot now ignore its inaction, nor, as stated in *Murphy Door Bed Co., Inc v. Interior Sleeping Systems, Inc.*, 874 F.2d 95, 101 (2 Cir. 1989), ignore public perception once public association has occurred. There is no justification for ignoring media reports. And, even if there were, IHSA would not thereby be endowed with rights it never had, nor would the association of the mark with the NCAA tournament be erased.

The courts below considered the media reports as **evidence** of the association of MARCH MADNESS with the NCAA tournament, and nothing more. This is perfectly consistent with existing law, and is certainly not contrary to any decision of this or any other court. To have ignored such evidence would have been to ignore the *sine qua non* of trademark law — the source indicated by a mark — and to ignore the reality that, to the public, MARCH MADNESS means the NCAA tournament. Thus, the petition should be denied.

III.

WHETHER THE SEVENTH CIRCUIT COURT OF APPEALS "CREATED A NEW DUAL-USE TRADEMARK" WHICH "UNDERMINES THE LONG ACCEPTED FUNCTION AND UNDERSTANDING OF TRADEMARKS."

The Seventh Circuit did not "create a new dual-use trademark," as IHSA continually asserts in its Petition. The court's opinion states nothing of the kind, and the concept of "dual use" of trademarks is, in any event, hardly novel.

In its arguments to the Seventh Circuit, IHSA insisted that the existing case law which allowed media reports to be considered as evidence of the public's understanding of a term (especially in genericness cases) was not applicable to IHSA, because MARCH MADNESS was not generic, but, rather, was the name of both the IHSA and NCAA tournaments. As the Seventh Circuit correctly observed,

> We cannot see what difference that makes. There is no magic in labels. Let 'March Madness' be called not a quasi-generic term, or a term on its way to becoming generic, but a dual-use term. Whatever you call it, its a name that the public has affixed to something other than, as well as, the Illinois high school basketball tournament. A trademark owner is not allowed to withdraw from the public domain a name that the public is using to denote someone else's good or service, leaving that someone and his customers speechless. . . . It is a case of first impression, and we think that for the

> sake of effective communication it should be resolved against trademark protection, thus assimilating dual-use or multiple-use terms to generic terms.

(Petitioner's Appendix, pp. 5a-6a). The court's statement is far from the creation of "a new dual-use trademark," and even farther from "undermining the long accepted function and understanding of trademarks." The court, as quoted, simply recognizes that (1) MARCH MADNESS means two distinct services — the NCAA tournament and related promotional products, as well as the IHSA tournament and related promotional products; (2) the fact that many of the "media reference" cases (cases which have used media evidence to show the public understanding of a term) have been genericness cases is not a basis to ignore or distinguish those cases, because the media reports are simply evidence of the meaning of the term to the public; and, ultimately; (3) the public understanding of MARCH MADNESS cannot be ignored so as to permit IHSA to extrapolate its limited rights in the mark to cover the NCAA tournament and related goods. (Petitioner's Appendix, p. 7a).

Moreover, dual-use or multiple-use trademarks are hardly novel. RAMS are pickup trucks and St. Louis football players; LEXIS is a computer service, while LEXUS is an automobile; WILDCATS are Kansas State University basketball players and Northwestern University basketball players; a ROLLING STONE is a magazine and a rock singer; VIKINGS are sewing machines and Minnesota football players; TIGERS are University of Missouri baseball players and a Detroit baseball players; and AMEX is the American Stock Exchange and American Express, to name but a few.

IHSA's assertion that trademarks may, under the Seventh Circuit's decision, "now identify more than one source for the

same and related goods and services, sold in the same geographic region, through the same channels of trade" (Petition, p. 8) is simply ridiculous. Indeed, the Seventh Circuit, said such dual-use situations should be resolved "against trademark protection." (Petitioner's Appendix, p. 6a). IHSA's assertion also implies that MARCH MADNESS is such a mark, which it is not. The NCAA and IHSA tournaments and their related goods are not the same; they are not sold in the same geographic regions; and they are not sold through the same channels of trade. The fact that IHSA and NCAA MARCH MADNESS have coexisted for over fifteen years without the slightest confusion on the part of anyone is ample evidence of this clearly understood distinction. Thus, the courts below did not "undermine the long accepted function and understanding of trademarks."

The Seventh Circuit's decision dealt with a "novel issue of trademark law," an "issue of first impression." (Petitioner's Appendix, pp. 1a and 6a, respectively). Its decision, as well as the district court decision, was well grounded in existing precedent, consistent with trademark law and principles, and a correct and fair resolution of the facts. The Petition should be denied.

IV.

WHETHER THE SEVENTH CIRCUIT COURT OF APPEALS HELD THAT MEDIA USE OF MARCH MADNESS "DIVESTED" IHSA OF ITS RIGHTS IN THE MARK, "TRANSFERRED" THOSE RIGHTS TO ANOTHER, OR "UPSET THE BALANCE BETWEEN TRADEMARK PROTECTION AND THE FIRST AMENDMENT."

IHSA's assertions that it was divested of its rights, that its rights were transferred to NCAA, and that the balance between

trademark protection and the First Amendment was thus upset, are neither accurate nor logical.

IHSA neither had nor could have rights in gross to MARCH MADNESS. As shown above, and as found by the courts below, IHSA has typical, limited trademark rights consistent with its use of the mark. Its mark denotes the Illinois high school basketball tournament to those in the Illinois area; its rights are coterminous with that event and its source; **and, it still has those rights. IHSA was not divested of anything.**

IHSA's rights were, accordingly, **not transferred** to the NCAA, or anyone else. Had that been the case, the NCAA, not IHSA, would have the right to control the use of MARCH MADNESS in connection with the Illinois high school basketball tournament, a power neither the NCAA nor its licensee GTE have ever claimed or presumed. Indeed, it appears it is IHSA that wants a transfer of NCAA's right to control the use of MARCH MADNESS in connection with the NCAA tournament, a dubious proposition, because NCAA, not IHSA, is the source of the NCAA tournament. 15 U.S.C. §1127.

Since IHSA was the victim of neither a divestiture nor a forced transfer of its rights, its conclusion that the First Amendment was compromised does not follow.

In fact, IHSA's entire argument that the balance between trademark and First Amendment protections was upset by a "taking" of its trademark rights is illogical, as is its assertion that the Seventh Circuit's decision "threatens the protections provided by the First Amendment." (Petition, p. 13). It is not perceived how the media's First Amendment protection would be diminished by asking the media not to call the NCAA tournament the Super Bowl, nor is it perceived what delicate First Amendment/trademark balance has been upset by failing

to give IHSA a fifteen year "bye" in MARCH MADNESS. Under IHSA's theory, ASPIRIN may yet be resurrected as a trademark on the ground that the public had a First Amendment right to call all pain-relievers "aspirin."

This case is not, and never has been, about the First Amendment. Rather, the issue is whether media use is evidence of a mark's meaning to the public and its association and public identification with a particular source. The Seventh Circuit, based upon sound principles, reasoned that it was evidence, as it has been in the past. That ruling merely applies established law to a new factual circumstance; it does not diminish any right of the press under the First Amendment.

V.

WHETHER THIS CASE OF FIRST IMPRESSION IS APPROPRIATE FOR REVIEW BY THIS COURT.

As indicated by the Seventh Circuit, this was a case of first impression. It was decided based on well-established trademark precedent and principles. Indeed, as a case of first impression, it could hardly have been contrary to existing precedent. The decision was abundantly fair and correct, and, in any event, does not implicate the principles this court has indicated as important in determining whether to grant a writ of certiorari.

Under Supreme Court Rule 10, there are simply no compelling reasons justifying the grant of the IHSA's Petition. There are no conflicting decisions of any state or federal court, let alone conflicting decisions of United States Courts of Appeals.

The decisions of the courts below surely do not depart from the "accepted and usual course of judicial proceedings" so as to call for exercise of this Court's supervisory power.

There is no important question of federal law which needs to or should, be settled by this Court, nor is there any conflict with any precedent of this Court.

IHSA has advanced no reason why this Court should grant its Petition, save its spurious implication of the First Amendment, which has nothing to do with the decisions of the courts below, and is truly irrelevant to the principles involved in this case.

If, as it appears, IHSA's disagreement is with the inferences drawn from the evidence by the courts below, the petition should also be denied. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

There is simply no reason justifying the grant of certiorari in this matter, and GTE asks the Court to deny the Petition.

CONCLUSION

The Seventh Circuit Court of Appeals correctly affirmed the decision of the District Court. This case is not appropriate for review by the United States Supreme Court. GTE asks this Court to deny ISHA's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — EXAMPLE OF MEDIA USE TAKEN FROM D. EX 18

For convenient reference, a few examples of the media use are set out below (all taken from D. Ex 18) (emphasis added):

1. "Pro baseball, pro football, and pro basketball have left CBS' once-powerhouse sports schedule, but the **N.C.A.A. Division I men's basketball tournament**, the network's signature event, enrolled with the network today through 2002. . . . It will cost CBS an average $216 million annually to show the **event known as March Madness**."

New York Times, December 12, 1994 (D. Ex. 18, Doc. N2).

2. "**March Madness** will extend into April this spring.

"The **NCAA basketball playoffs** on CBS will roar into the semifinals next Saturday, . . ."

Boston Globe, March 27, 1983 (D. Ex. 18, Doc. N10).

3. "AW: What is **March Madness** to you?

"NR: **March Madness** is basketball at its best. It's when all of these teams, sixty four teams that qualify for the **National Championship tournament**, are getting ready to get it on. "

American Way Magazine, March 1, 1995 issue, in an interview with University of Arkansas Coach Nolan Richardson (D. Ex. 18, Doc. N13-15).

4. "**March Madness - the name given to the National Collegiate Athletic Association's men's tournament** that began yesterday — is a kind of divine Lunacy for CBS."

Appendix A

New York Times, March 18, 1994 (D. Ex. 18, Doc. N37).

5. Answer to New York Times Crossword Puzzle (as appeared in the Kansas City Star of February 11, 1994 clue "**March Madness org.**" was "**NCAA.**" (D. Ex. 18, Doc. N50-51).

6. "**March Madness**, in the form of the **NCAA basketball playoffs** on television, is more complicated than ever."

Boston Globe, February 28, 1982 (D. Ex. 18, Doc. N59).

7. "The **NCAA invitations** flew out of Shawnee Mission, Kan. yesterday afternoon, and the NCAA, at least, has noticed that Boston is becoming a college basketball city. For the second year in a row, both Northeastern and Boston College were asked to dance in the **March Madness**."

Boston Globe, March 8, 1982 (D. Ex. 18, Doc. N62).

8. "The **NCAA tournament**, otherwise known as Havoc in the Hinterlands or **March Madness**, is now down to the Sweet 16. The regional games begin tonight and tomorrow night in the not-so-sweet sites of Provo, Utah, Birmingham, Ala., Raleigh, N.C., and St. Louis."

Boston Globe, March 18, 1982 (D. Ex. 18, Doc. N64).

9. "The method to **March Madness** or The Road to Albuquerque or whatever this year's catchy phrase will be, is, of course Sampson. The two-time national player of the year (only Oscar Robertson and Bill Walton were named consensus

player of the year three times), Sampson came back for his senior season, turning down the pros for the third time."

Boston Globe, December 11, 1982 (D. Ex. 18, Doc. N67).

10. "The traditional **March Madness** of the **NCAA basketball playoffs** will be even madder this week on television because 1984's first round of 21 games has been expanded to 32."

Boston Globe, March 12, 1985 (D. Ex. 18, Doc. N75).

11. "Neither top-ranked Temple (32-1) nor fifth-ranked Duke (27-6) thinks it has to adjust to the other team's style of play. Both think they know the method to **March Madness**."

Boston Globe, March 26, 1988 (D. Ex. 18, Doc. N84).

12. "There's no way you can water it down. The SEC is 4-10 in the last three years in the **NCAA's March Madness**."

Houston Post, March 27, 1988 (D. Ex. 18, Doc. N88).

13. "Those who are fans of John Thompson and his program find little wrong with the way the season starts for their team as long as it keeps ending in the **NCAA Tournament**, and usually far along in that.

"The other side claims that the early matchups against teams which can't even play with the big boys during **March Madness** are an embarrassment and should be stricken from the record."

Appendix A

Houston Post, December 20, 1989 (D. Ex. 18, Doc. N89).

14. "Fisher goes home to Ann Arbor today 6-0 in his brief career as a college head coach, all six of those wins having come in the last month. He got promoted two days before **March Madness** convened, after Bill Frieder accepted the Arizona State job and was told to get lost by Athletic Director Bo Schembechler."

Houston Post, April 4, 1989 (D. Ex. 18, Doc. N92).

15. "What's the fuss here in Lawrence, Kan.? It's only Feb. 19 - too early for **March Madness**."

"But it is the day before a nationally televised game between Kansas and Duke."

* * *

"'It very much simulates **NCAA Tournament play**' Duke Coach Mike Krzyzewski said. Both teams will be in the tournament. We kind of look at it as a way of preparing for the NCAA's, what with CBS, the distractions like you guys staying here, and things like that."

St. Louis Post Dispatch, April 4, 1988 (D. Ex. 18, Doc. N137).

16. "The spectacle you see now, and for 60 hours on television, until the New Orleans finals on April 5, has been dubbed "**March Madness**" by the network hucksters and it is the grandest play-off of any — 112 college teams (64 men's, 48 women's) joyfully colliding, with their brass bands and cheerleaders and painted crazies in tow, in cities from Orlando,

Florida, to Salt Lake City, Utah. **March Madness** is one of the nation's three greatest athletic events . . ."

* * *

"If Bill Clinton thinks he is going to get the public ear about taxes or health care during this next few weeks, he is mistaken. A congressional aide confesses the three sets in his boss's office are on CNN, C-Span and **March Madness**. There is no contest. Let the country pause."

Time Magazine, March 29, 1993 (D. Ex. 18, Doc. N155-156).

17. Headline of article about the **NCAA tournament** finals reads: "The Way Balls Bounce Two spectacular athletes epitomize the highs and lows of **March Madness**."

Time Magazine, April 19, 1993 (D. Ex. 18, Doc. N155).

18. Headline: "First Moves Toward **March Madness**; Area Teams Begin Practice in Their Quest for **NCAA Tournament**."

"This spring, college basketball players from 64 schools will experience **March Madness**, and the hysteria that accompanies the start of the **NCAA tournament**. Later, athletes from four select institutions will have further cause for exhilaration — a berth in the Final Four on April 1."

Washington Post, October 16, 1988 (D. Ex. 18, Doc. N163).

19. "They don't call it **March Madness** for nothing."

"This year's **NCAA Men's and Women's college**

basketball tournaments, which tip off Thursday (men's) and Friday (women's), are turning out to be a marketing bonanza for advertisers hoping to capture a piece of the elusive Generation-X market. 'It's a premiere sports event that reaches fans, but also the light sports viewer,' says BBDO sports guru Steve Grubbs."

USA Today, March 12, 1996 (D. Ex. 18, Doc. N741).

20. "Last year's leading man, UCLA — the West's top seed — was a typical marquee attraction. Beset by immoderate pressures and on the verge of disaster through most of **March Madness**, the team finally came through with a grace-under-fire performance to defeat Arkansas, the previous years's leading man.

American Way Magazine, March 1, 1996 (D. Ex. 18, Doc. N743-746).

21. "To understand why fans call the next three weeks **March Madness**, one had only to spend time with Georgetown's Allen Iverson last week."

New York Times, March 11, 1996 (D. Ex. 18, Doc. N749).

22. "**MARCH MADNESS** 1. At the first **N.C.C.A. basketball championship**, in 1939, eight teams competed. This afternoon, 64 teams will be selected, as has been done since 1985. 2. Bill Bradley of Princeton holds the single-game Final Four scoring record, 58 points against Wichita State in 1965. 3. After leading UCLA to its third straight title in 1969, Lew Alcindor also won his third straight award as most outstanding player in the tournament. 4. Eddie Sutton is the only man to

coach tournament teams from four schools: Creighton, Arkansas, Kentucky and Oklahoma State. 5. Fifty years ago, a tournament game was televised for the first time on WCBS in New York. An audience estimated at 500,000 watched Oklahoma A&M (now Oklahoma State) defeat North Carolina, 43-40 at Madison Square Garden. 6. In 1970, the tournament produced $550,000 in TV revenue, this year's total is estimated at $178.3 million."

New York Times Sunday Magazine, March 10, 1996 (D. Ex. 18, Doc. N756).

Many additional examples of the media use of the mark in connection with the NCAA tournament are shown in D.Ex 18 and 43.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED MARCH 20, 1996

Testimony of David Fry, IHSA Executive Director

[Page 28, line 6 to Page 36, line 23]

BY MR. KRAAI:

Q: You said a lot of things, Mr. Fry, and I want to make sure that I get them accurately.

You indicated that you have used March Madness on programs for your tournament?

A: Yes, I did.

Q: Those programs were used at the site of the tournament which over most of the years was in the Champaign-Urbana area?

A: Yes, they were.

Q: You indicated that you used March Madness in bulletins that you sent to member schools?

A: To schools and many others, yes.

Q: And those bulletins were about the Illinois high school basketball tournaments?

A: About a variety of the aspects of the tournament, including pairings information and credentials information, etcetera.

Q: And those were sent to the member schools in Illinois?

A: Schools, to the media, to those that had expressed interest and a need to have that information.

Q: The cups that you mentioned, I think you indicated you started using the cups in about maybe sometime before 1980?

A: Yes. Today I simply indicated that was a cup from 1980. In testimony yesterday in deposition, I did indicate that we used them as early as 1974 perhaps.

Q: The cups were used at the tournament site?

A: Yes, they were a souvenir cup sold at the tournament site.

Q: They mention -- such as this example, Exhibit 3, they mention the year of the tournament and perhaps a picture of the facility, the auditorium, and refer to the tournament itself?

A: This particular one does, yes, sir.

Q: The other cups you're talking about were cups that were used like as a sort of souvenir at and during the tournament time?

A: Yes. There were cups used at and during the tournament time and subsequently IHSA has produced and distributed cups apart from the tournament as a merchandise item that is distributed through our office.

Q: Are they cups that refer to the tournament or the IHSA?

A: Both. There are cups that refer to March Madness and others that refer to IHSA.

Q: Those are sent to people who are interested in obtaining those cups perhaps as a souvenir of the Illinois high school tournament?

A: Who are interested in them in that respect or who are interested in high school sports and see this as a unique piece of memorabilia they would like to maintain.

Q: You mentioned a book about the tournament. It's a historical book about the high school basketball tournament?

A: Yes, March Madness, entitled "The History of High School Basketball in Illinois". I think that's the subtitle.

Q: Are those sold directly to interested people by the IHSA?

A: They are today. When the book was published, they were initially sold through retail outlets in a typical fashion that a publication might go on the marketplace. They were also sold at the tournament site and subsequently by mail order.

Q: They were sold principally at book stores in Illinois?

A: That would be fair to say.

Q: As I understand, the first time you used March Madness on a piece of apparel or clothing was probably in around the 1990 time frame or a little before that?

A: No. The first time March Madness appeared on apparel would have been uses at the site of our state tournament or by retailers in the community of our state tournament back in the 1980's. The first time IHSA itself marketed merchandise at the

tournament site would have been, let me trace it back here, approximately 1983 or 1984.

Q: And that apparel, I think you said, was sold at the tournament site or in stores in the Champaign-Urbana area? Those are the first ones that you made?

A: Yes, they were.

Q: I think you said you used March Madness on towels and banners and the like?

A: I think I said towels. I don't recall saying banners. They have been used on banners most recently, but I don't think I said that.

Q: You started that in approximately 1994?

A: March Madness, I believe that was first used on towels — it may have been 1993, close to 1994.

Q: Were those sold at the tournament site?

A: Yes, but also distributed apart from the tournament site.

Q: To stores in the city area around where the tournament was held?

A: No. They were distributed through the association offices. I don't believe those towels were ever a retail market item.

Q: You say the "association offices". You're talking about in Bloomington?

A: Yes, the Illinois High School Association.

Q: The video cassette you mentioned that uses March Madness was a video cassette about the Illinois High School basketball tournament?

A: Yes, it was.

Q: Was that kept by the association in Bloomington and sold there or was it sold at the tournament site or what?

A: It was sold at the tournament site, it was sold by and through the producer, Kost Broadcast Sales in Chicago, it was sold through the association's office in Bloomington and currently that's where all remaining copies reside and are now sold only by the association either through mail order or when taken to a given location for sale.

Q: Did you say that videotape was first sold in about 1988?

A: Yes.

Q: You mentioned sweatshirts, pins, caps and the like that bear March Madness. Those are of more recent origin, aren't they? They date in the nineties sometime?

A: Yes, going back to 1991 or so with pins and caps and those kinds of items.

Q: Were the sweatshirts, pins and caps also sold at the tournament site?

A: Yes.

Q: Were they sold in local stores in the Champaign-Urbana area?

A: No, none of the merchandise produced by the association was sold in those local venues.

Q: So if you didn't sell it, you took it back to Bloomington and people could order it if they wished; is that correct?

A: In fact, the programs for the tournaments, I believe, contained mail order information for that kind of merchandise.

Q: You, I believe, licensed approximately 10 or 11 other state associations to use the mark March Madness?

A: We have licensed, to my recollection, 11 state high school associations in a variety of parts of the country to utilize March Madness.

Q: Those licenses were mostly executed in mid to late 1995?

A: That's correct.

Q: And in those licenses, you have authorized the state, the other state association, whatever it is, to use the term March Madness provided they use it in connection with their tournament at their tournament site?

A: Yes. We have licensed them to use it for their event which is a basketball event and its license is to allow it to be used for the promotion and marketing of the event. It is not a license that lets them do other things.

Appendix B

Q: The written licenses that you have with 10 or 11 state associations are for at term of 3 years each?

A: That's correct.

Q: And you charge them $10.00 for the 3 years?

A: That's correct.

Q: You mentioned that you had a web site. When was your web site set up?

A: The IHSA web site went online on January 15, 1996.

Q: Your license to PepsiCo was executed in December of 1994?

A: Yes, after an extended time period of trying to develop it, but that was its culminating date.

Q: Actually on that license, if I recall correctly, it is the entity March Madness LLC that is the licensor?

A: Yes, that's correct.

Q: Has that license been assigned to the IHSA?

A: Yes, it has.

Q: And that license covers soft drinks related to basketball?

A: It covers the retail marketing of PepsiCo soft drinks in a basketball formatted promotion.

Appendix B

Q: Before — excuse me. You mentioned a license to Wilson and I think that covers basketballs and perhaps some apparel items, does it not?

A: Basketballs, apparel and other basketball memorabilia or paraphernalia.

Q: That license was executed in early 1996?

A: The final signing of the document was in early 1996 after the goods were already in production, but an agreement had been struck in mid-fall of 1995.

Q: Are your licenses to Wilson and PepsiCo, which I think came in early 1996 and very late 1994 respectively, are those licenses — do they permit the use of March Madness in a context other than in connection with the Illinois high school basketball tournament or the Illinois High School Association?

A: They are licenses for use of the mark March Madness in connection with basketball. They are not restricted in any way to the Illinois High School Association tournament.

Q: Does the IHSA have a registration from the United States Patent and Trademark Office for the mark March Madness for use in connection with the service of sanctioning, supervising and regulating high school basketball tournaments?

A: For the term March Madness?

Q: Yes.

A: IHSA has a license for the mark America's Original March Madness that states that purpose.

Q: Do you have a federal trademark registration for March Madness in connection with the service or services of sanctioning, supervising and regulating high school basketball tournaments?

MR. YOUNG: Your Honor, I think this is going beyond the scope of the testimony that you have requested.

THE COURT: Overruled.

A: No. We simply have the common law and historical use rights that have been well established.

BY MR. KRAAI:

Q: Are there any other uses which I have not asked you about that you recall?

A: None that I recall. I think you've covered the ground pretty well.

Q: You mentioned — my colleague reminded me — you mentioned radio and television broadcasts in which March Madness was used. Those were broadcasts of the Illinois high school basketball tournaments, were they not?

A: Yes, those were broadcasts of the tournament, tournament games.

Q: Was the PepsiCo license that you got in December of

1994, or that March Madness LLC got in December of 1994, was that the first time that you licensed somebody to use the mark March Madness in some context other than in connection with the Illinois High School Association or its basketball tournament?

A: It was not the first attempt we had made to do so, but it was the first success that we had.

[Page 41, line 17 to Page 43, line 4]

BY MR. KRAAI:

Q: Is it the position of the IHSA that the NCAA may use March Madness in connection with its tournament only if permission is secured from the IHSA?

A: Well, it's our position that — in fact, this was a part of other discussions — that we agreed that NCAA could utilize the term in connection with its tournament, with its promotion, with the media uses, journalistic uses, etcetera, but not in a commercial sense without license.

Q: So your position is that the NCAA may use March Madness in connection with its tournament only if it secures appropriate permission from the Illinois High School Association?

A: If it's going to be utilized in any commercial sense, yes. IHSA is not seeking to interfere with journalistic uses of the mark, but commercial uses. For basketball, we believe we hold rights to and those rights should be licensed.

Appendix B

Q: Is it IHSA's position the use by the IHSA of March Madness in connection with its high school basketball tournaments and the use by the NCAA in connection with its NCAA tournament can co-exist together without confusion?

A: As I understand it, the issue at stake in the trademark matter is one of single ownership, clear single ownership, and if IHSA is clearly identified as owner, then that issue can be resolved.

Q: If I understand correctly what you've just said, the two uses by the NCAA and IHSA could in fact co-exist without confusion provided that the IHSA gives the NCAA a license or permission to use March Madness in connection with the NCAA tournament?

A: The issue is not one of confusion of product. The issue is one of confusion of ownership. The mark March Madness is owned for basketball by the Illinois High School Association and we believe, with that clarification and licensed use, confusion will not exist to the issue of ownership and that's what trademark is about as I understand it.

Q: So the issue is who owns the mark; is that correct?

A: Absolutely. I think — well, that was nonadmissible material, but that was clarified in that letter as well.

[Page 44, lines 1 to 11]

BY THE COURT:

A: Well, what the Illinois High School Association has on

the web is a home page for the organization and it includes a variety of materials about the Illinois High School Association and its programs including results, data from the various championships the association conducts, etcetera, announcements, bulletins about the organization.

Q: It's limited to your high school basketball?

A: It's focused on the Illinois High School Association and its programs and a major part of the material there relates to the March Madness basketball program of the association, yes.

[Page 47, line 10 to Page 48, line 4]

BY THE COURT:

Q: You indicated that at one time, at sometime in the past, local merchants marketed clothing?

A: Yes.

Q: Primarily in the Champaign area?

A: Yes. Since the tournament was held there for an extended period of time, local merchants did that.

Q: Was that done with your permission or by some license?

A: It was done with our knowledge, but not under any formal license.

Q: Well, I'm not quite sure what that means. Did you receive any benefit from that?

A: No, we did not.

Q: Was there a practice of notifying you in advance that they were going to do this?

A: No, there was not in those early days.

Q: So it would be a situation where you basically find out that some entrepreneur in the Champaign area decided to market clothing?

A: Yes, except when the Assembly Hall itself sold such merchandise and that was done with our permission.

[Page 50, lines 6 to 17]

BY THE COURT:

Q: You said that from your point of view, this was an issue of ownership rather than confusion; is that correct?

A: It's an issue of ownership rather than confusion of product, yes.

Q: Because you're not really suggesting that if someone were to see a product that said NCAA March Madness that they would somehow confuse that with the Illinois high school basketball tournament?

A: What we believe would happen is that when they then saw March Madness or IHSA March Madness, they would think that we were using something that didn't belong to us and in fact it's the other way around.